LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 12 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 339 1/15

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

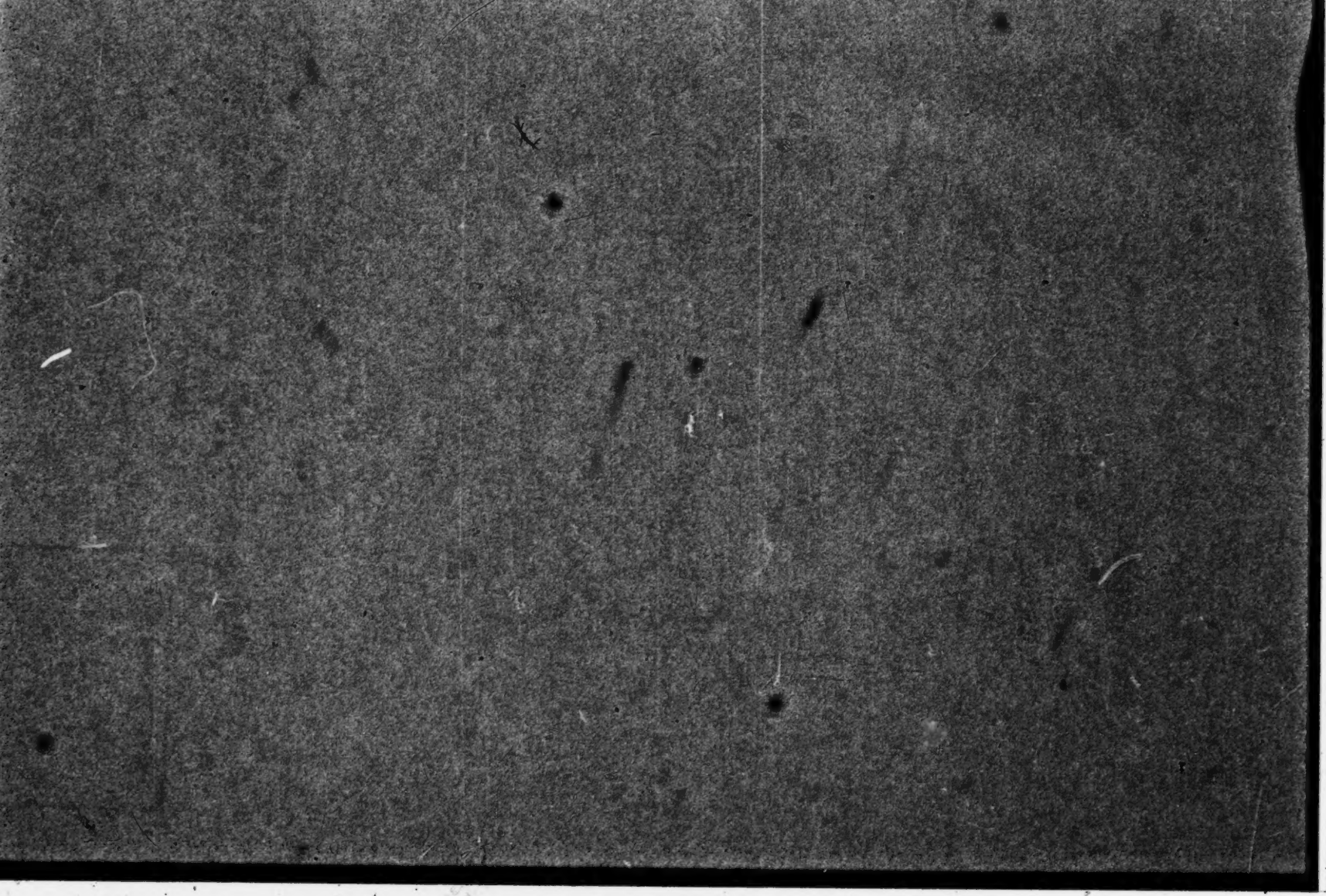
APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES B. WELSH
1112 Robert Bush Drive
South Bend, Washington

JOHN GAVIN
410 Miller Building
Yakima, Washington

ERNEST M. INGRAM
216 Becker Building
Aberdeen, Washington

Attorneys for Petitioner



IN THE

Supreme Court of the United States

October Term, 1965

No. .....

STELLA HUGHES,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES B. WELSH
1112 Robert Bush Drive
South Bend, Washington

JOHN GAVIN
410 Miller Building
Yakima, Washington

ERNEST M. INGRAM
216 Becker Building
Aberdeen, Washington

Attorneys for Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF WASHINGTON

APPENDIX INDEX

		Page
APPENDIX A	Summons and Complaint	5
APPENDIX B	Answer and Cross Complaint	10
APPENDIX C	Reply	14
APPENDIX D	Findings of Fact and Conclusions of Law	16
APPENDIX E	Judgment—Superior Court	19
APPENDIX F	Statement of Facts	21
APPENDIX G	Appellant's Brief	38
APPENDIX H	Respondent's Brief	50
APPENDIX I	Appellant's Reply Brief	54
APPENDIX J	Supreme Court Decision	59
APPENDIX K	Order Denying Petition for Rehearing	93
APPENDIX L	Remittitur	94

APPENDIX "A"

IN THE

Supreme Court of the United States

October Term, 1965

No. .....

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

SUMMONS AND COMPLAINT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON Defendant	No. 14546 COMPLAINT

Comes now plaintiff and for cause of action alleges:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and that defendant State of Washington claims some right, title or interest easterly of said west boundary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein.

3.

That plaintiff and her predecessors in interest have been in the actual, open and notorious posses-

sion of the above described real property for more than ten years immediately last past, under the claim and color of title thereto, made in good faith, and during said time have paid all real estate taxes legally assessed thereon, and during said time no other party or parties have claimed or asserted any right, title or interest in and to said property.

WHEREFORE plaintiff prays that the court enter judgment herein establishing the westerly boundary line of plaintiff's property to the line of mean high tide of the Pacific Ocean and as against any right, title, claim or interest of the defendant, State of Washington.

CHARLES B. WELSH
Attorney for plaintiff

STATE OF WASHINGTON }
COUNTY OF PACIFIC } ss.

I, Charles B. Welsh being first duly sworn, depose and say that I am attorney for plaintiff in the above entitled action and proceedings, that I have read the foregoing complaint know the contents thereof, and that the same and the whole thereof is true as I verily believe That I make this verification for the reason that plaintiff is without the State of Washington.

CHARLES B. WELSH

Subscribed and sworn to before me this 19 day of September, 1962.

Jean Holbrook

Notary Public for the State of Washington, residing at South Bend, Washington.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PACIFIC

STELLA HUGHES, Plaintiff

vs.

STATE OF WASHINGTON Defendant

SUMMONS

THE STATE OF WASHINGTON, to the said STATE OF WASHINGTON, Defendant.

You are hereby summoned to appear within twenty days after the service of this summons upon you, exclusive of the day of service, if served in the State of Washington, and within sixty days exclusive of the day of service if served without the State of Washington, and defend the above entitled action in the court aforesaid; and answer to the complaint of the Plaintiff and serve a copy of your answer upon the undersigned attorney for the said Plaintiff at their office below stated, and in case of your fail-

ure so to do, judgment will be rendered against you according to the demands of the complaint which will be filed with the clerk of said Court, and a true copy of which is herewith served upon you.

CHARLES B. WELSH
Attorney for plaintiff

Post Office and Office Address: 1112 W. Water St.,
South Bend, Washington

APPENDIX "B"

ANSWER AND CROSS CLAIM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	ANSWER AND
STATE OF WASHINGTON,	CROSS-COMPLAINT

For answer to the complaint this defendant:

1. Disclaims all interest in the real estate described in paragraphs 1 and 2 of the complaint lying easterly of a line described as follows:

> Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104.683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1° 14' 05" 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

2. Admits that it claims an interest in the lands lying westerly of the line described in paragraph 1 of this answer, and as to the lands it claims an interest in, the defendant denies all further allegations of paragraph 1, 2, and 3 of the complaint.

By way of cross-complaint, the defendant alleges:

1. It is one of the sovereign states of the United States of America, admitted to the Union on November 11, 1889.

2. The property described in paragraph 1 of the complaint borders upon the Pacific Ocean. Accretions have formed to the shore and beach of the Pacific Ocean in front of that property both before and after November 11, 1889.

3. Repeated court decisions, administrative construction, and legislative action have created a rule of property under state law whereby:

(a) All accretions formed prior to November 11, 1889, belong to the adjoining upland owner;

(b) All accretions formed after November 11, 1889, belong to the State of Washington, subject to the legislative dedication that they constitute a highway to remain forever open to the use of the public, as set forth in Laws of 1901, chapter 110; and

(c) The dividing line between accretions formed before November 11, 1889, and those formed thereafter is the line of ordinary high tide as it existed on that date, is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date, and is that line which is set forth in paragraph 1 of the above answer.

Wherefore, the defendant prays that the line of ordinary high tide of November 11, 1889, as described in paragraph 3 (c) of this cross-complaint and as set forth in paragraph 1 of its answer be established

and decreed to be the fixed boundary between the property of the plaintiff and the property of the defendant, and that title to all property westerly of such line be quieted in the defendant State of Washington as against any and all claims of the plaintiff.

JOHN J. O'CONNELL
Attorney General

By HAROLD T. HARTINGER
Assistant Attorney General
Attorneys for Defendant

Office and P. O. Address
Temple of Justice
Olympia, Washington

STATE OF WASHINGTON } ss.
COUNTY OF THURSTON }

DON LEE FRASER, being first duly sworn on oath deposes and says that: He is the duly appointed and acting Deputy Supervisor for the Department of Natural Resources of the State of Washington, and is authorized to make this verification for and on behalf of the defendant; he has read the foregoing Answer and Cross-complaint, knows its contents, and believes the same to be true.

DON LEE FRASER

Subscribed and sworn to before me this 26th day of November, 1962.

MARJORIE B. STONE
Notary Public in and for the
State of Washington, residing
at Olympia

APPENDIX "C"

REPLY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON, Defendant	No. 14546 REPLY AND ANSWER TO CROSS-COMPLAINT

Comes now plaintiff and replying to defendant's answer and answering defendant's cross-complaint admits, denies and alleges as follows:

1.

Admits paragraphs 1 and 2 of the cross-complaint.

2.

Denies paragraph 3 of the cross-complaint.

WHEREFORE plaintiff prays that defendant's cross-complaint be dismissed and that she recover according to the prayer of her complaint.

CHARLES B. WELSH
Attorney for plaintiff

STATE OF WASHINGTON
County of Pacific } ss.

I, Charles B. Welsh, being first duly sworn say: that I am attorney for the plaintiff in the above en-

titled action; that I have read the foregoing reply and answer, know the contents thereof and the same is true as I verily believe. That I make this verification on behalf of plaintiff for the reason that she is without the state of Washington.

CHARLES B. WELSH

Subscribed and sworn to before me this 27th day of November, 1962.

JEAN HOLBROOK

Notary Public in and for the state of Washington residing at South Bend.

APPENDIX "D"

FINDINGS of FACT and CONCLUSIONS of LAW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON Defendant	No. 14546 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on for trial before the Court on January 23, 1964 and from the record made and the arguments of counsel the court finds the following facts to be true:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north of the line between Sections 4 and 9, Township 11 N.R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the Westerly boundary line of said property is a line corresponding to the

line of mean high tide of the Pacific Ocean. That mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

3.

That since the original survey and establishment of the meander line by the United States government in 1859 imperceptible accretions have formed in front of the property as hereinabove described, both before and after November 11, 1889, and all of said accretions belong to plaintiff as the upland owner.

4.

That the State of Washington has no right, title, claim or interest in and to said accreted lands or in any part of plaintiff's property lying east of the line of mean high tide as defined herein.

FROM THE FOREGOING FINDINGS OF FACT the court makes the following CONCLUSIONS OF LAW: That plaintiff is entitled to judgment quieting title in her against any claim of the State of Washington in and to her property as hereinabove described lying east of the line of mean high tide of the Pacific Ocean as it now or hereafter may exist.

DONE IN OPEN COURT this 10th day of February, 1964.

/s/ WARNER POYHONEN
Judge

PRESENTED BY
CHARLES B. WELSH
Attorney for plaintiff

APPROVED FOR ENTRY AND
PRESENTATION WAIVED

H. T. HARTINGER
Assistant Attorney General

APPENDIX "E"

JUDGMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	
STATE OF WASHINGTON Defendant	JUDGMENT

The above entitled action having come on for trial before the Court and the court having entered Findings of Fact and Conclusions of Law:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N.R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

The Western boundary of which is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a com-

plete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889.

DONE IN OPEN COURT this 10th day of February, 1964.

/s/ WARNER POYHONEN
Judge

PRESENTED BY:
CHARLES B. WELSH
Attorney for plaintiff

APPROVED FOR ENTRY AND PRESENTATION WAIVED:

HAROLD T. HARTINGER
Assistant Attorney General

APPENDIX "F"

STATEMENT OF FACTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	
STATE OF WASHINGTON, Defendant.	STATEMENT OF FACTS

Before the Honorable Warner Poyhonen, Judge of the Superior Court, Grays Harbor County, sitting as Visiting Judge at South Bend, Pacific County, Washington, January 23, 1964.

APPEARANCE:

For plaintiff, Charles B. Welsh, Attorney at Law, South Bend, Washington.

For defendant, Harold T. Hartinger, Assistant Attorney General, Olympia, Washington.

As Amicus Curiae, Ted Zelasko and Ernest Ingram, Attorneys at law Aberdeen, Washington.

WHEREUPON the following proceedings were had and done, to-wit:

INDEX

EXHIBITS

	PAGE IDENTIFED	ADMITTED
Defendant 1 through 7	5	5

COURT'S DECISION Page 6
COURT'S CERTIFICATE Page 13

COURT: Hughes vs. State of Washington. I want to inquire of counsel if they are ready now or do they want me to defer it until 1:30. Whatever they wish. I will do it any way you like. I doubt if you can finish this morning but if you want to start in and plaintiff would like to make his record this morning.

MR. HARTINGER. We have a completely agreed statement of facts and I think we can easily put this in 20 minutes or so and perhaps come back after lunch and defer the argument until 1:30.

COURT: That would be fine.

MR. HARTINGER: Mr. Zelasko and Mr. Ingram are appearing as Amicus Curiae.

COURT: Mr. Welsh, are there any others that are appearing or desire to appear? Have you heard of any?

MR. WELSH: Not to my knowledge. Do you want to proceed—I take it—

MR. HARTINGER: I guess I have the laboring oar all the way through. Just by way of preliminary statement. Mrs. Hughes, the plaintiff, owns property along the Pacific Ocean and she has set forth in her complaint a description of this property as it relates to the area above or landward and it is not in dispute. She claims, in addition, ownership of accreted lands, that is, the land in front of the property she described out to the mean high tide line on the Pacific Ocean. The State has disclaimed any interest in the property that the plaintiff claims lies above—what we will call—the fixed boundary of the 1889 boundary of the tidelands. This case, as I explained to Your Honor the other day in another court, is one case which is being tried of several. I counted the similar cases and I think we have seven. Mr. Welsh can probably verify they have seven other cases that have the same problem that is raised by the State's cross complaint here. In these seven cases we have stipulated as to this issue. The Court's determination here will determine the issue in those seven cases. There are three other cases—the one in Grays Harbor County and two more in this county which have the same issue. We don't have a formal stipulation. Then, of course, several other cases have the same problem. They are not filed yet, but still are on some counsel's desk one way or another. As to the State's—

MR. WELSH: Excuse me counsel. I think we should further define the admitted facts. This is a representative case among many. Each of these cases, as well as the one at present—the original title was acquired by plaintiff or predecessors in interest prior to 1889 from the United States Government.

COURT: Prior to statehood?

MR. WELSH: Prior to statehood.

COURT: As a patent from United States Government?

MR. WELSH: Yes. So that our actual conflict is whether or not the 1889 mean high tide line governs in this case or the mean high tide at any time wherever it may be. We contend it is the latter and the State contends the former. A little bit of clarification here. There are really two problems in this case—one, the accretion problem. The other is the rule for defining the boundary. Whether it is the 1889 boundary or whether it is the present day boundary. Technically, the boundary that the Federal Court used and the one plaintiffs use, is called the line of mean high tide. And when we use that term, we are talking about the technical definition. The State argues the line of vegetation which is a sort of mark on the ground. Those are the two issues actually involved in the thing. The Federal rule does not take

cognizance of the vegetation line title-wise. As far as my reading has progressed, this is a theory used by the engineers of the State of Washington exclusively. It is used customarily by engineers—

COURT. Are you referring to the line of vegetation—

MR. WELSH: Yes. In streams and river, but a vegetation line, title-wise, is a meaningless thing as I understand it from the Federal Rule.

COURT: All right.

MR. HARTINGER: Well, again we are trying this case obviously because we tried this issue in the Federal Court and where the Federal Government was owner of these ocean lands as a trustee for some Indians. In the Federal Court we were attacked on both grounds. The Federal people denied our claim to the land that is formed by accretion since statehood. They likewise argue that this mean high tide line, as used by the U.S. Coast and Geodetic Survey, was the boundary of the tideland. They insisted that the rule that the State has been using—the line of vegetation—is a rule that can be used only for rivers and lakes. Now, as to the factual basis behind the line of vegetation. The State in disposing of its tidelands has used the line of vegetation, but the facts are also that everybody else in the state has been using

it. The Supreme Court has defined it as the boundary line. Our problem on this issue is the accretions. The Court of Appeals has decided the state law must be disregarded and that Federal law, as developed by the Federal Court, must be applied. Basically this is our issue.

COURT: Are you ready to start putting in some evidence.

MR. HARTINGER: What I would like to do—I have talked to counsel about it and he has no objections. We prepared the record by starting with requests for admission of facts. I would like to take these requests, have them marked as an exhibit and then introduce them in this fashion so that counsel and everybody else will have some order to their files. It would save reading to the reporter quite a number of things.

COURT: There are no objections to that?

MR. WELSH: No objections to the procedure if it could be noted that plaintiffs prefer not to make a specific objection to each but simply to the relevancy in toto.

COURT: These will be defendant's exhibits?

MR. HARTINGER: Yes. What we have labeled

Requests for Admission No. 1 is marked Defendant's Exhibit No. 1 for Identification. Request for Admissions of Facts No. 2 has been marked Defendant's Exhibit No. 2 for Identification. Request for Admission of Facts No. 3 has been marked Defendant's Exhibit No. 3 for Identification. Request for Admission of Facts No. 4 has been marked as 4 for Identification. Defendant's 5 for Identification is Request for admission of Facts No. 5. Now, we have one map, which is labeled "Typical Beach Section, Pacific Ocean Beach." Mr. Welsh has agreed that this could come in subject to the same objection to the other. This will be Defendant's 6.

COURT: All right. These may be admitted one through six subject to the objection as to their relevancy.

MR. WELSH: Yes.

MR. HARTINGER: I have one more item and that is the government publication entitled, "Tidal Datum Planes." And the Clerk has marked that Identification 7.

COURT: It may be admitted.

MR. HARTINGER: Then we just have one more fact we wish to orally stipulate to and that is the government survey of the upland adjoining this area was made in 1859.

MR. WELSH: Agreed.

COURT: You want to secure an oral stipulation by counsel that the government survey—

MR. HARTINGER: Of the area in question—

COURT: Of the area in question was made in 1859.

MR. HARTINGER: Yes, Your Honor.

COURT: That stipulation may show for the record.

MR. HARTINGER: All our exhibits are in.

COURT: All that you have offered—there are seven of them.

MR. HARTINGER: That is the record. I would like to hand to Your Honor a trial memorandum. It is quite lengthy and then after the Court has had an opportunity to read it, I would like to explain what the case is about—what our contention is about. Why we make them and argue the matter.

COURT: We may adjourn at this time and give me a little time to read this. Say two o'clock?

MR. HARTINGER: That will be fine.

COURT: For oral argument.

MR. WELSH: That is satisfactory.

COURT: We will be at recess until two.

(Court recessed until 2:00 p.m. and reconvened with all parties present.)

COURT: Court's is session.

(Counsel then proceeded to argue their case after which the Court made his oral decision as follows:)

COURT: I think I would be regarded as rather naive if I failed to appreciate that we are involved in a question in all probability is not going to end here with a decision of the Superior Court of Pacific County. Frankly we are in an area—I don't know as to the circumstances of the parties involved of this particular litigation; an area in which there should be some day at least a final adjudication as to the rights of the people so that we will know where we are for sure and what we own and we don't own; who owns what and who doesn't. With that in view, I expect that about all I am probably doing today is deciding who has to take the initiative of an appeal. This may seem—I am aware of the importance of the problems involved here. This may seem somewhat of a hasty decision in such an important case. I could postpone it by taking the matter under advisement and to delay a month or two or by writing a memorandum opinion on it; I would take the matter under advisement and write a memorandum opinion if I felt there was any real purpose being served in doing

so. I have had some experience with these problems. I never tried one as a lawyer. I represented private clients on two or three occasions with the State of Washington on the other side. The State backed up a little and agreed to sell on rather reasonable terms or give my clients a 99-year lease for a dollar or some such thing that made the lawsuit unnecessary and I never did get to court on the two or three matters which I represented private clients in my lawyer days. As a State legislator in 1947 and 1949, I gave the problem considerable thought. In those days I was quite concerned by reason of the fact some of my constituents out in the Oyehut and Ocean Shores way were quite concerned in getting something accomplished. I gave the matter considerable study. I have had a number of conversations with representatives in the Land Department of the State. One of the Superior Court cases in the exhibit is one of mine out of Grays Harbor County in '58. That is the Sunshine Mining Co. vs. Union Gas Development. I don't know if it is particular in point. I think all I had to do was decide where the line of vegetation had been on a certain date because under state law, title rested on the state permit and it was a factual question and neither party in that litigation was questioning the state's right or title or could they by reason of whatever rights they had, rested on those permits. I watch-

ed with considerable interest the Ocean Shores development. The lawsuit in Minard quiet title action involved several miles of ocean front. That didn't come before me. It was settled. Of course, that Superior Court decision established ownership in the State of Washington. I have never felt it was truly an adversary proceedings. What Minard did — he brought a lawsuit. I think part of the proceedings there was an effort to shut out some squatters out there, who probably had good title by adverse possession if Minard was owner of the property and probably had no rights if the land belonged to the State during all of those years. I don't want to go into the merits except this comment, if Minard owned the property actually, probably it wasn't a bad deal for him. Litigation through the Supreme Court of the United States might have cost him a lot of money. If there wasn't any question about the state's ownership then, then it was state property beyond all question and the propriety of a sale of several miles of beach for $40,000 might be open to question. I will say I have given the matter some little study. I have thought about it from time to time during probably a third of my lifetime. Not continuously but have been aware of it. With that explanation, I hope that the decision won't be regarded as being a hasty one. It is a rather interesting circumstance to me that this

being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line. It is not in the record—is pure speculation on my part—I have a feeling that what has happened many times and what actually did in two or three of my clients that the State was inclined to back away and so the problem has never been settled by our State Supreme Court. With the result that we have had 74 years of development of a body of State law based on departmental decisions, administrative determination, attorney general's opinions, opinions and decisions of Superior Courts for the most part and a few by our State Supreme Court to kind of get rather close to the question involved here, but doesn't decide it squarely. We have had, as Mr. Hartinger said, a development of a body of of State law or local rule — I guess we can call it a change or modification in common law. They all mean the same thing. We are met with the argument that now we ought not to change that because of the upsetting effect a different decision would have. I don't believe that there is any question that a state may develop its own body of law to change the common law. I think that could be conceded. I don't think anyone would argue very seriously to the con-

trary. Common law can and does change. The problem here is whether—the problem here is a question of jurisdiction. Whether the state law does apply or whether Federal law should be applied. I just don't see any escape from the decision in the Borax Consolidated vs. Los Angeles case in 296 U.S. 10. That is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, that is, the 294 F. (2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns' case, the Ninth Circuit Court case in '61, was a Federal Case. He was a resident of the state. The State had a lawyer, who for many years felt that the Washington rule—the local law—should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said—this was quoted in the Sampson John's case—"Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pa-

cific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." A number of cases are cited in support of that doctrine. And in that case, of course, the Court in the opinion was the enunciation of the Federal rule—the boundary between tidelands and uplands is the mean high tide line. Such to be determined by the average of 18.6 years. That is the holding of the Supreme Court of the United States which the Circuit Court quoted in the Sampson Johns' case. They went on to follow the holding in the Borax case to the effect that the line is the line of mean high tide of the average elevation as observed at a location through a tidal cycle of 18.6 years. I was personally disappointed that the Supreme Court of the United States denied the certiorari in the Sampson Johns' case. I was hoping they would take jurisdiction and I am aware that no particular inference ought to be

drawn from the fact that they denied certiorari except possibly that if the Circuit Court of Appeals had departed from the rule announced in Borax and had held in favor of the State of Washington rather than in favor of the Federal Government, I just can't help but feel the Supreme Court of this nation would have wasted no time in granting the certiorari and taking another look at the problem. Now, whether these decisions are right, whether the court was right in the Borax Case and again in the Sampson Johns' Case, that's what it did and is something that I can't be concerned with. All I'm saying is it seems to me they did say it. I feel I am bound by it. I can't do very much more about it. There are people understandably who would not be happy with the rule. I think the opinion of Judge Chambers in the Circuit Court case is worth reading. It is a short paragraph and may express the feelings of a great many of us. Judge Chambers said, "As a District Court thought, I think that the question of the line of title ought to be decided by state law, but as I read Borax Consolidated Ltd. vs. Los Angeles, 296 U.S. 10, I think the road sign points to the line being treated as a Federal question, as I concur." He is bowing to the inevitable. That is just the feeling I have. I know that nobody has ever worked harder on this case or cases involving this question than Mr. Hartinger.

He has put a great part of his lifetime into it and it looks like he is going to spend some more. If he can persuade the Federal Court and the Supreme Court of the United States to take another look at it, more power to him. I am going to grant the plaintiff's judgment on both issues—as to the title to the accretion and as to the line.

MR. HARTINGER: I don't propose to call Your Honor back. It is just as easy to go over to Montesano and I would like to stipulate that the judgment may be signed by Your Honor in Montesano.

MR. WELSH: Certainly.

COURT: I have that right anyway.

STATE OF WASHINGTON
County of Pacific } ss.

I, WARNER POYHONEN, one of the Judges of the Superior Court of the State of Washington and the Judge before whom the above-entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring at the trial of said cause, and is hereby made a part of the record herein.

I do further certify that the same contains all

the material facts, matters and proceedings heretofore appearing in said cause and not already a part of the record herein.

I do further certify that 7 exhibits, marked Defendant's Exhibits 1 through 7, hereto attached, are all the exhibits admitted in evidence upon the trial of said cause.

DONE IN OPEN COURT this 10th day of April, 1964.

/s/ WARNER POYHONEN
JUDGE

APPENDIX "G"

APPELLANT'S BRIEF

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,
vs.
STATE OF WASHINGTON
Appellant,
No. 37583

APPEAL FROM THE SUPERIOR COURT
OF PACIFIC COUNTY

Honorable Warner Poyhonen, Judge

BRIEF OF APPELLANT

JOHN J. O'CONNELL,
Attorney General

HAROLD T. HARTINGER,
Assistant Attorney General

LAUREL L. TILLER,
Assistant Attorney General

ATTORNEYS FOR APPELLANT

Office & Post Office Address: Temple of Justice, Olympia, Wn.

PLEADINGS AND PROCEEDINGS

Mrs. Hughes' complaint[11] sets forth her claim against the state as one to establish and quiet title to real property. She described the outer boundary of her property as the present line of "mean high tide" of the Pacific Ocean.[12]

The state served and filed an answer and cross-complaint.[13] The state alleged that at the location in question accretions had formed to the shore and beach of the Pacific Ocean both before and after the date of statehood (November 11, 1889). The state disclaimed any interest in the accreted lands formed prior to statehood, but contended that all lands thereafter formed constituted a portion of the public highway dedicated and reserved for the people by the legislature. The inner boundary of the public beach and shore, according to the state's theory, was the line of ordinary high tide of November 11, 1889, defined as

> the line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date.

The state specifically alleged that its claimed

---

[11] Tr. 1-2.

[12] See the prayer of the complaint which amplifies the description of the property set forth in the complaint's first paragraph.

[13] Tr. 4-6.

location of the inner boundary of the public beach area was based upon a state rule of property that had its origin in state court decisions, legislative action, and administrative construction of legislative action.

Mrs. Hughes' reply and answer to cross-complaint[14] disputed only the state's contention that a local rule of property had been established, her position at all times being that any state law was immaterial because federal judge-made law was controlling.[15]

At the time of trial there were no disputed questions of fact for the court to decide.[16] All evidence, by agreement, was submitted in documentary form. Seven items of written materials were introduced as exhibits.

After hearing argument of counsel, the trial judge made his oral ruling.[17] The judge preferred state law[18] but nevertheless felt compelled by the federal court decisions in Borax, Ltd. v. Los. Angeles[19] and United States v. Washington[20] to establish the dis-

---

[14] Tr. 7.
[15] St. 3, 5.
[16] St. 5-6.
[17] St. 6-12.
[18] St. 11.
[19] 296 U.S. 10 (1935).
[20] 294 F. 2d 830 (9th Cir. 1961)

puted boundary solely as a matter of federal judge-made law.[21]

Findings of fact, conclusions of law,[22] and judgment[23] were entered in accordance with the court's oral decision. The state thereafter gave timely notice of appeal[24] to bring the litigation before this court for review..

TITLE TO ACCRETED LANDS

Acquisition of Private Title to Accreted Tidelands Is a Matter of State Law

Under common law, when publicly owned tidelands are slowly and imperceptibly built up by a deposit of ocean sands, the public is divested of title to the tidelands and title is acquired by the private riparian owner. By our first assignment of error we assert that the State of Washington can and did change this common law rule. We maintain that state law can modify the common law so that the gradual build-up of tidelands works no change in ownership, and we contend that the 1901 enactments did just this to those portions of the ocean shore and beach in Pacific and Grays Harbor counties which were dedicated to the perpetual use of the public.

---

[21] St. 11-2.
[22] Tr. 8-9.
[23] Tr. 10-1.
[24] Tr. 12.

Mrs. Hughes challenges the power of the state to make a change in the common law accretion rule. She holds that change, if it be made, must come from the federal government. (She does not suggest, of course, that the common law rule is unchangeable.)

This challenge to the efficacy of state law over state tidelands is the first matter we here explore.

I

Under our federal system of government, sovereignty is divided between state and nation[3]. At an early date it was decided that ownership of lands underlying navigable waters was an incident of that sovereignty which belonged to the original thirteen states rather than to the national government.[4] Thus ownership of tidelands was an incident of the original states' inherent sovereignty.

The State of Washington, when it was admitted to the Union, was admitted on an equal footing with the original thirteen states.[5] Neither the federal government nor the then existing states had the power to deny to this state full rights of sovereignty

---

[3] U. S. Const., Tenth Amendment.

[4] Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 230 (1845); United States v. Louisiana, 363 U.S. 1, 16 (1960).

[5] State v. McCoy, 63 Wash. Dec. 2d 423, 439, 387 P. 2d 942 (1963).

because the power to admit new states to the Union[6] meant.[7]

> a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.

The State of Washington, by its constitution, asserted its full rights to lands underlying navigable waters.[8] The state therefore has the same rights as the original thirteen states in controlling the rights and incidents in these lands.[9] When a riparian owner acquires title by imperceptible accretions to the sovereign's lands, it therefore follows that it is acquisition of title under state law, not federal law.[10] Likewise, state law determines whether the riparian owner will acquire title to additional land created by a

---

[6] U. S. Const., Art. 4, § 3.

[7] Coyle v. Oklahoma, 221 U.S. 559, 567 (1911).

[8] Wash. Const., Art. XVII, § 1:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: * * *

[9] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1876); Shively v. Bowlby, 152 U.S. 1, 40 (1894); Hardin v. Jordan, 140 U.S. 371, 382 (1891); Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63 (1921); McGilvra v. Ross, 215 U.S. 70, 79 (1909); Mann v. Tacoma Land Co., 153 U.S. 273, 283-4 (1894).

[10] Joy v. St. Louis, 201 U.S. 332, 342 (1906); St. Louis v. Rutz, 138 U.S. 226, 250 (1891).

sudden deposit of soil[11] or by the deposit of soil caused by an act of man.[12]

It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. Louisiana, for example, chose to retain title to accretions formed on the sea or an arm of the sea[13] in accordance with prior Spanish law.[14] But California, another example, expressly modified its common law moving boundary rule by statute. The validity of the statute was upheld by the federal court of appeals[15] in an opinion which well expresses our position here:

> (T)he decision in Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide-land or submerged land in front of a riparian proprietor, and thus deprive him of the right of future accretion, what tenable

---

[11] Barney v. Keokuk, 94 U.S. 324, 337 (1876).

[12] Barney v. Keokuk, supra; Annotation: Glenn, "Rights to land created at water's edge by filling or dredging," 91 A.L.R. 2d 857-88 (1963).

[13] Zeller v. Yacht Club, 34 La. Ann. 837 (1882) (only proprietors on rivers and streams could acquire title by accretion).

[14] Ker v. Couden, 223 U.S. 268, 278 (1911).

[15] Western Pac. Ry. v. Southern Pac. Co., 151 Fed. 376, 399-400 (9th Cir. 1907).

ground is there for saying that the state may not by statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held in trust for the public by virtue of any accretion that might thereafter be deposited thereon?[16]

II

The federal court of appeals, in United States v. Washington,[17] conceded that all we have said above is true, provided only that title to the uplands abutting the state's tidelands is not in the United States nor derived from it. We do not reach the first issue (abutting title in the United States) in this case because the government parted with its title by a pre-statehood patent.[18]

We do reach the second issue (abutting title derived from the United States) because Washington is a public lands state, i.e., one wherein all land titles originate from the United States.

In our view, the court of appeals misread the opinions of the United States supreme court. There

---

[16] 151 Fed. at 400.

[17] 294 F. 2d 830 (9th Cir. 1961).

[18] Needless to say, we do not agree with the court of appeals on this issue. The government's rights over its own property, whatever they may be, should not be permitted to override sovereign rights of the state over its property.

is absolutely no basis to limit a state's right to modify the common law solely on the ground that private title had its inception from the United States rather than some other sovereign. When the government issues its patent there is no principle of federal law that raises the common law incidents of real property ownership to the status of immutable attributes of the title acquired, forever freed from the possibility of change by the state. It is just not so.

Two illustrations immediately come to mind to demonstrate our point. Prior to 1961 and Initiative Measure No. 208,[19] this state did not recognize joint tenancies in real property. Even now the incidents of joint tenancy are not necessarily the same as the common law incidents.[20] Similarly, this state has never recognized the common law incidents of real property ownership by husband and wife. This state, instead, adopted the community property concept from the Spanish law.[21]

It cannot be seriously argued that these laws, being changes in the common law, are not operative simply because all real estate in Washington was once owned by the federal government. They, like

---

[19] Laws of 1961, chapter 2; chapter 64.28 RCW.

[20] See, e.g.., Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30-43 (1962).

[21] Chapter 26.16 RCW.

any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

To move closer to the issue at hand, we can say that this state's right to modify the common law incidents of riparian ownership cannot be doubted either, even though the real property comes originally from the government and borders navigable water or concerns rights closely connected with navigation. We can see this clearly when we look at the matter of riparian rights generally.

From the earliest days of statehood, Washington has expressly denied the existence of all riparian rights on navigable waters.[22] Mr. Justice Brandeis even noted this fact for the United States supreme court.[23] This fact was also acknowledged by an early commentator on riparian rights in the west coast states.[24] As this commentator predicted,[25] it is now a rule of property in this state that land adjoining navigable water has no riparian rights.[26]

---

[22] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891).

[23] Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 64 et seq. (1921).

[24] Black's Pomeroy on Water Rights 534 (1893).

[25] Id. at 540.

[26] Only recently this court denied the existence of riparian rights. Grill v. Meydenbauer Bay Yacht Club, 61 Wn. 2d 432, 435, 378 P. 2d 423 (1963). Prior cases so holding are numerous. E. g., State v. Sturtevant, 76 Wash. 158, 163, 135 Pac. 1035 (1913), and cases cited; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331, 95 Pac. 278 (1908), and cases cited.

In denying the existence of riparian rights, this court was well aware that title to all land within the state was once in the United States, for it specifically denied that this fact was an infirmity in the state doctrine.[27] The federal cases[28] cited by the court would, indeed, be inexplicable if the principles announced in the cases were to be disregarded simply because Washington is a public lands state. Of course this is not what the United States supreme court meant. In a later case it specifically rejected this argument, saying:[29]

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

III

Contrary to the assumption of the court of appeals, Borax, Ltd., v. Los Angeles[30] does not prohibit state modification of the common law accretion rules

---

[27] Brace & Hergert Mill Co. v. State, 49 Wash. 326, 333, 95 Pac. 278 (1908).

[28] Barney v. Keokuk, 94 U.S. 324 (1876); Packer v. Bird, 137 U.S. 661 (1891); St. Louis v. Rutz, 138 U.S. 226 (1891); Hardin v. Jordan, 140 U.S. 371 (1891); Shively v. Bowlby, 152 U.S. 1 (1894).

[29] St. Anthony Falls Water Power Co. v. Water Comm'rs, 168 U.S. 349, 363 (1897).

[30] 296 U.S. 10 (1935).

where adjoining upland title is derived from the United States. Borax was not an accretion case (it involved no accreted lands) nor did it decide any matter of riparian rights generally.

In Borax the court intended to define the territorial limits of the tidelands which a state might claim as an incident of its sovereignty. However, once a state's claim had fastened upon particular lands, the court had no intention of limiting state jurisdiction over the property rights and interests in the lands. Specifically, the court did not imply that a state must surrender its tidelands to an upland owner under the common law accretion doctrine. On the contrary, the court left the matter of surrender entirely to the state. It said:[31]

> Rights and interests in the tidelands, which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338; Shively v. Bowlby, (152 U.S. 1), p. 40; Hardin v. Jordan, 140 U.S. 371, 382; Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63.

---

[31] 296 U.S. at 22.

APPENDIX "H"

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,

vs.

STATE OF WASHINGTON,
Appellant.

No. 37583

Appeal from the Superior Court of Pacific County Honorable Warner Poyhonen, Judge

---

BRIEF OF RESPONDENT

CHARLES B. WELSH
Office and Postoffice Address
1112 Robert Bush Drive
South Bend, Washington.
Attorney for Respondent.

ARGUMENT IN SUPPORT OF JUDGMENT

The lower court was impelled to follow the decisions in Borax Consolidated Ltd. vs. Los Angeles, 296 U.S. 10 (1935) and the U. S. vs. State of Washington, 294 Fed. 2d 830, (9th Circuit 1961) Certiorari denied. (St. 9, 10). The opinion in this latter case was written by Judge Hamley, a former member of this state's supreme court who on page 2 of his opinion said:

> "Declining to be bound in its determination by the definition of the term "ordinary high water mark" under California law, the Court said:
>
> > "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer vs. Bird, 137 U.S. 661, 669, 670; Brewer-Elliott Oil Co. v. United States, 260 U.S. 77, 87; United States v. Holt Bank, 270 U.S. 49, 55, 56; United States v. Utah, 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338; Shively v. Bowlby, supra (152 U.S. 1) p. 40; Hardin v. Jordan, 140 U.S. 371, 382; Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63",. 296 U.S. at 22".

The court went on to state that while no question of accretions was involved in the Borax case:

"The principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such title, "Involves the ascertainment of the essential basis of a right asserted under federal law."

having thus concluded the court further stated on page 5:

"The common law is the source of tideland title which the United States held and which passed to the State of Washington when it was admitted to the Union. Federal law follows the common law in determining the measure of the title to lands retained by the United States. The Supreme Court has implicitly so recognized.[5]

At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion."

"Shively v. Bowlby, supra 5, 152 U.S. at 35; Jeffris v. East Omaha Land Co., supra, 134 U.S. at 189; Barney v. Keokuk, supra, 94 U.S. at 337; County of St. Clair v. Lovingston, supra, 90 U.S. (23 Wall.) at 68; Jones v. Johnston, 59 U.S. (18 How.) 150, 156; New Orleans v. United States, 35 U.S. (10 Pet.) 662, 717."

---

[5] See Borax Consolidated, Ltd. v. Los Angeles, supra, 296 U.S. at 22-23; Jefferis v. East Omaha Land Co. 134 U.S. 178, 189, 194-97; Barney v. Keokuk, 94 U.S. 324; County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68-69.

Further on page 6 the court said:

> "In case of tidal waters such as are involved here, the high water mark means the line of high water as determined by the course of the tides, not as determined by the physical markings made upon the ground by the water.——the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years." (Borax case supra.)
>
> "This is an unchanging elevation and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time."

Finally, this decision settled, and we think permanently, the title to and extent of a patentee's title and the method of determining the water boundary thereof.

Since the U. S. Coast and Geodetic Survey has made a determination of all of these tidal cycles or datum planes, it is a simple matter to determine the line of mean high tide not only at any place but at any time, both presently and in the past; and as the upland changes in height the upland owner loses or gains. The lower court well stated it has taken seventy-five years to arrive at a definitive conclusion but that time has now arrived. (St. 9)

APPENDIX "1"

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,

vs.

STATE OF WASHINGTON
Appellant

No. 37583

APPEAL FROM THE SUPERIOR COURT
OF PACIFIC COUNTY
HONORABLE WARNER POYHONEN, JUDGE

Reply Brief of Appellant

JOHN J. O'CONNELL,
Attorney General,
HAROLD T. HARTINGER,
Assistant Attorney General,
LAUREL L. TILLER,
Assistant Attorney General,

Attorneys for Appellant.

Office & Post Office Address: Temple of Justice, Olympia, Wn.

III

BORAX, LTD. V. LOS ANGELES AND UNITED STATES V. WASHINGTON DO NOT NULLIFY STATE REAL PROPERTY LAW

Mrs. Hughes contends that this court is compelled to affirm the judgment of the court below on authority of Borax, Ltd. v. Los Angeles[7] and United States v. Washington[8] without regard to state law, be it statute or judicial decision.[9]

The state disputes this contention.

First, as to the common law rule of accretions, neither case precludes state change of the rule which affects title to accreted land formed after the United States has parted with title to the adjoining uplands. Borax, on the one hand, did not involve accreted lands and it did not involve any change in the common law. United States v. Washington, on the other hand, did involve these issues, but holds only that a change in state law may not be applied against the federal government and its property.

There is absolutely no basis under our federal system for limiting a state's right to modify the common law solely on the ground that it pertains

---

[7] 296 U.S. 10 (1935).
[8] 294 F. 2d. 830 (9th Cir. 1961).
[9] "Argument in Support of Judgment," Brief of Respondent, pp. 10-13.

to real property, title to which can be traced to the United States rather than to some other sovereign. This state, for example, may abolish joint tenancies or it may adopt community property laws. Both are changes in the common law, yet both are valid changes even though they affect title to real estate once owned by the United States. We believe the changes in common law riparian rights, including the rights to accretions are equally within the competence of the state.[10]

Secondly, as to the definition of "ordinary high tide" neither Borax nor United States v. Washington invalidates this court's decision in Harkins v. Del Pozzi[11] upon which we rely.

United States v. Washington involved property of the United States, not property to which the government had parted title prior to Washington statehood, as is the case here.

In Borax the California legislature had granted to the City of Los Angeles, by statute, certain tidelands "below the line of mean high tide of the Pacific Ocean."[12] The Borax Company, as adjoining upland owner, sought to limit the tidelands to the line of

---

[10] Brief of Appellant, pp. 33-43.
[11] 50 Wn. 2d 237, 310 P. 2d 532 (1957).
[12] 296 U.S. at 12.

the "neap tides."[13] which it deemed the equivalent[14] (as the court did also)[15] of the physical markings on the ground. The court ruled that the city could claim beyond the line of the neap tide (the physical markings on the ground) to the line of mean high tide, as provided by the California statute. The court did not say that a state's tideland ended before the line of vegetation is reached.

There is every reason to uphold the validity of the line of vegetation rule of Harkins v. Del Pozzi: (1) it is an interpretation of a provision of our state constitution[16] (2) which adopts the same rule for dividing tidelands from uplands as has been announced in the past for dividing lake bed[17] and river bed[18] from uplands; (3) it continued as state law the federal rules on this subject as they existed at the time Washington became a state.[19] Insofar as there may be a federal interest in the matter,[20] Congress

---

[13] 296 U.S. at 15, 22.
[14] See summary of its brief, 80 L. Ed. at 10.
[15] See Court's comments, 296 U.S. at 22.
[16] Art. 17, § 1.
[17] Austin v. Bellingham, 69 Wash. 677, 680-81, 126 Pac. 59 (1912).
[18] Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 497, 68 Pac. 74 (1902).
[19] San Francisco v. LeRoy, 138 U.S. 656, 671-72 (1891); Shively v. Bowlby, 152 U.S. 1 (1894).
[20] See, Miskin, The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957).

has spoken,[21] and this court's determination of the common law is controlling.[22]

IV

COMMON LAW ON TITLE TO ACCRETIONS MAY BE CHANGED BY STATE LAW

Mrs. Hughes makes only one answer[23] to the state's argument[24] that the common law rule on title to accretions may be changed by state law. Her answer is that the court of appeals, in the United States v. Washington,[25] refused to permit state changes to affect uplands owned by the United States. But Mrs. Hughes' property has not been government owned at any time since statehood and that case hardly helps her position here.

Not one of the remaining cases[26] cited by Mrs. Hughes supports a power in Congress (or in the federal courts) to change the common law rule. These cases uphold state jurisdiction.

---

[21] Rules of Decision Act, 28 U.S.C. § 1652 (1958): The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require and provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply.

[22] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[23] Brief of Respondent, pp. 14-18.

[24] Brief of Appellant, pp. 32-43.

[25] 294 F2d 830 (9th Cir. 1961)

[26] Barney v. Keokuk, 94 U.S. 324 (1876); Shively v. Bowlby, 152 U.S. 1 (1894); Hardin v. Jordan, 140 U.S. 371 (1891); Port of Seattle v. Oregon & Washington R.R., 255 U.S. 56 (1921); McGilvra v. Ross, 215 U.S. 70 (1909); Mann v. Tacoma Land Co., 153 U.S. 273 (1894); Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891).

APPENDIX "J"

SUPREME COURT DECISION

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent, v. STATE OF WASHINGTON, Appellant.	No. 37583 EN BANC Filed January 20, 1966

WEAVER, J.—The question of law generated by this appeal spring from Article 17 of the state constitution, its historical background, and it iterpretation, legislative, administrative, and judicial.

Article XVII—TIDE LANDS

§1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

§2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, the same is not impeached for fraud.

Plaintiff, Stella Hughes, is the owner of an upland tract of land on the Long Beach Peninsula near Ocean Park, Pacific County, Washington. Title is deraigned from a patent issued prior to statehood. In this action to quiet title plaintiff alleges[1] that the west boundary of the tract is described as

> the line of ordinary high tide of the Pacific Ocean.

She prays that the court establish the westerly boundary of her property to be "the line of mean high tide of the Pacific Ocean." No time for the determination is indicated.

The trial court found that since the original survey and establishment of the meander line by the United States government in 1859, imperceptible accretions have formed in front of plaintiff's property, both before and after November 11, 1889, and that all the accretion belongs to plaintiff as upland owner. The state does not claim the accretion prior to 1889, the date of its admission to the union. It contends, however, that the present western boundary

---

[1] Plaintiff alleges ownership of the following described property: Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

of plaintiff's land and the present eastern boundary of the state's tidelands is the line of "ordinary high tide" as it existed November 11, 1889. In its answer and cross-complaint, the state alleges that this line on November 11, 1889 was described as follows:

> Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104,683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1°14'05" 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

The state appeals from a judgment dated February 10, 1964, which determines:

> that the western boundary of the foregoing property [of plaintiff] is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years.

We point to the possible difference between "ordinary high tide," as set forth in the constitution, and "mean high tide as it now (February 10, 1964) or hereafter may exist," as determined by the trial court. We also point out that the superior court determined a possible changing or shifting western boundary for plaintiff's property.

This appeal brings into sharp focus the following

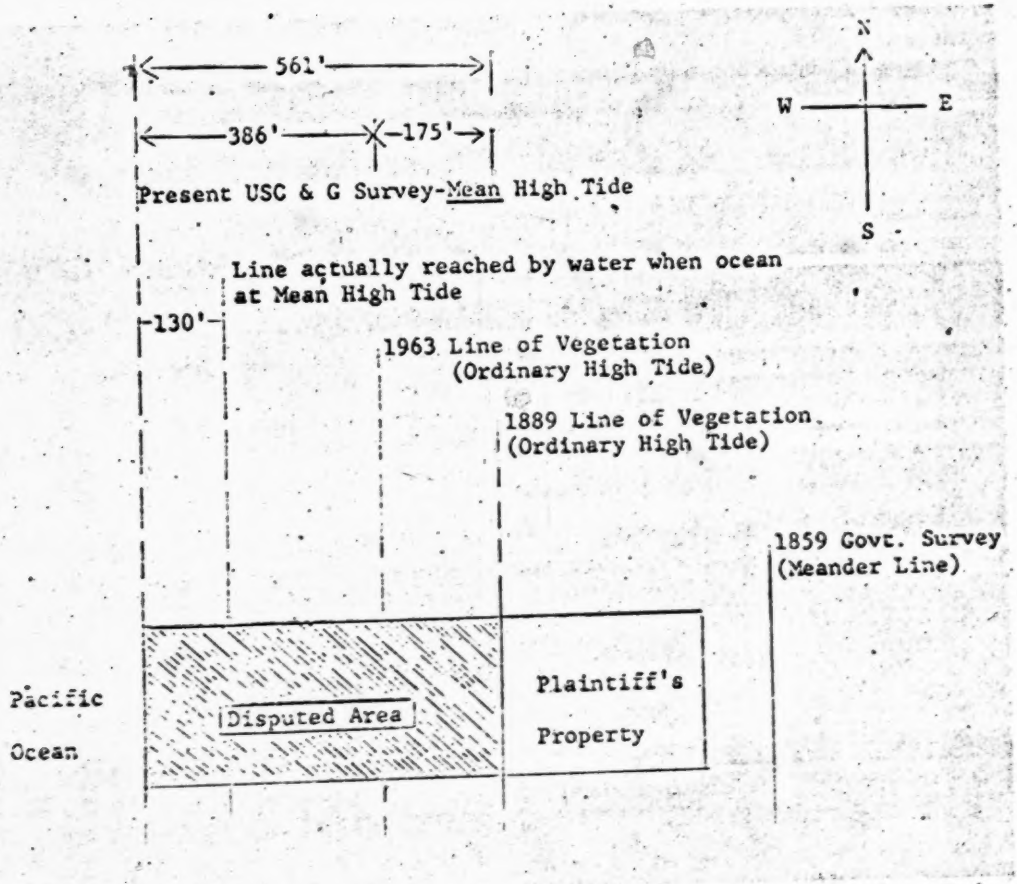
questions: (a) When did title to the tidelands vest in the State of Washington? (b) What is the nature of the State's ownership? (c) What is the extent of the State's ownership? i.e., what is the dividing line between the upland property and the state-owned tideland? (We are not concerned with the seaward line in the instant case. See the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1958 ed.). (d) Is the dividing line a fixed line or is it a changing line depending upon accretion or reliction? (e) If a fixed line, as of what date should it be established? The trial court said in its oral opinion:

> It is rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line."

Undoubtedly there are other questions that might arise, but we deem the foregoing sufficient to present the issue of the instant case.

For the sake of clarity and in order to illustrate the facts we set forth the following sketch, prepared by the court from exhibits in the record. It is not drawn to scale

(MAP) (See next page).


561'
386'
175'
N
W
E
S
Present USC & G Survey-Mean High Tide
Line actually reached by water when ocean at Mean High Tide
130'
1963 Line of Vegetation (Ordinary High Tide)
1889 Line of Vegetation (Ordinary High Tide)
1859 Govt. Survey (Meander Line)
Pacific Ocean
Disputed Area
Plaintiff's Property

History of Constitutional Provision

The questions presented by the instant case are not new. As early as 1854 the territorial legislature granted owners of property abutting navigable waters the right to build wharves, under certain conditions, and to "extend them so far into said waters or water courses as the convenience of shipping may require," and to maintain them for not more than 20 years.[2]

On numerous occasions the territorial legislature memorialized Congress to grant tidelands to the territory so that they might be sold and the funds used for internal improvements,[3] or to grant them to certain towns and cities to aid in their development.[4] In 1873 the territorial legislature passed an act confirming the title of the Seattle and Walla Walla Railroad and Transportation Company to the tidelands south of King Street in Seattle and around Elliot Bay "from extreme high to extreme low tide, and to deep water . . . derived by deed from the city of Seattle to the said company dated August 19, 1873," provided the first section of 15 miles of railroad be constructed within three years. The territory purported to convey such title "as would otherwise be-

---

[2] Laws of Washington Territory 1854, p. 377
[3] Laws of Washintgon Territory 1869, p. 527
[4] Laws of Washington Territory 1859, p. 500 (Olympia)
Laws of Washington Territory 1871, p. 220 (Olympia)
Laws of Washington Territory 1871, p. 213 (Seattle)

long to and vest in the state, upon the admission of Washington Territory into the Federal Union as a state."[5]

One cannot read the record of the proceedings of the state constitutional convention[6] and the newspaper and editorial comment published during the convention (Yelle v. Bishop, 55 Wn.2d 286, 292, 347 P.2d 1081 (1959)), between July 4 and August 22, 1889, without concluding, as do the historians of that period,[7] that the most vexing and politically sensitive problem confronting the convention was that of harbors, and the control, use, ownership, and disposal of the tidelands of the new state to be. No other problem was of more vital concern to the economic development of the state, for the tidelands in front of Seattle and other cities on Puget Sound and the ocean were of tremendous value.

During the convention suggested constitutional proposals ranged from a declaration of inalienable state ownership of tidelands with limited leasing privileges, to no declaration at all, thus leaving all questions of tideland ownership and use to the whim of

---

[5]Laws of Washington Territory 1873, p. 577

[6]The Journal of the Washington State Constitutional Convention, 1889, p. 809 et seq. (Book Publishing Co. 1962).

[7]See Nesbit, "He Built Seattle" p: 308 et seq. (University of Washington Press, 1961). This is a biography of Thomas Burke, Chief Justice of the Territorial Supreme Court, 1888-89.

future legislatures. The major source of difference arose from whether the state, the cities, or private individuals and corporations should control the water front. Generally, five groups brought pressure to bear upon the 75 members of the convention: (1) the owners of upland property; (2) the occupiers or preemptors of tidelands who had placed improvements thereon; (3) land speculators; (4) cities and towns; and (5) the railroads. The conflict of interests was sharp and the debates reported were acrimonious.

It was not until August 22, 1889, the final day of the convention, that Article 17 (quoted supra) was adopted.[8] The article is, in truth, a Janus-like compromise of the contentions of the various schools of thought in the constitutional convention. Although it asserts state ownership of tidelands and disclaims all right to tidelands theretofore patented by the United States, it makes no declaration of policy to govern the use or disposition of such lands. The convention left the use and sale of state-owned tidelands to the politics of future legislatures and to the interpretation to be given Article 17 by the Supreme Court.

---

[8]Austin Mires (a member of the constitutional convention), "Remarks on the Constitution of the State of Washington," The Washington Historical Quarterly, Vol. 22, No. 4, Oct 1931, p. 276.

Before discussing our decisional law, it is necessary to review briefly the tideland statutes subsequent to statehood, the definition of "the line of ordinary high tide," and the administrative and superior court interpretations of the statutes.

Tideland Statutes Subsequent to Statehood in 1889

Since Article 17 was a compromise of the various interests represented in the constitutional convention, it is not surprising to find tideland politics carried forward into subsequent legislative sessions.

The early statutes provide for the survey, classification, and appraisal of state-owned tidelands[9] and set forth the method and manner of sale or lease thereof. Oyster beds were "withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve."[10] A railroad was granted the right to maintain tracks and wharves on tidelands.[11] Although abutting property owners were given a preferential right to purchase tidelands, one having placed improvements thereon prior to March 26, 1890 had the exclusive right to purchase if used for "commerce, trade, residence, or business."[12] Laws

[9]Laws of 1889-90, p. 431 731; Laws of 1891, p. 403; Laws of 1893, ch. 17, p. 26; ch. 49, p. 241.
[10]Laws of 1891, p. 366.
[11]Laws of 1897, ch. 88, p. 228.
[12]Laws of 1897, ch. 89, § 45, p. 250.

of 1899, ch. 83, § 1, p. 132[13] was the first legislative recognition of accretion to tidelands. The statute provided:

> That any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold by the state shall belong to the state, ...

[1] The statute treats with accretion to tidelands "heretofore sold or that may hereafter be sold" by the state. The accretion belongs to the state. The statute does not purport to determine ownership of accretion when the tidelands have not been sold. See Strand v. State, 16 Wn.2d 107,129,132 P.2d 1011 (1943). We do not construe the statute in any sense to be a waiver by the state of its interest in tidelands. It is more logical to conclude that this is a legislative recognition of the state's claim to all accretion after 1889 whether the tidelands be sold or not. The statute is at least indicative of the legislative intent to claim accretion for the state under the limited circumstances identified.

It was not until Laws of 1901, chapter 105, p. 217, and ch. 110, p. 225, that the public's interest in

---

[13]Laws of 1899, ch. 83, § 1, amending Laws of 1897, ch. 89, § 51; reenacted by Laws of 1927, ch. 255, § 123; now codified as RCW 79.01.492. The reenactment made a few minor changes in the 1899 wording. See Ghione v. State, 26 Wn.2d 635, 650, 175 P.2d 955 (1946) for the changes.

tide and shoreland received legislative recognition. Sections 1 and 2, chapter 110 (RCW 79.16.170, 171) provide:

> That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean and between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be) from the Columbia river or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Washington on the north, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.
>
> No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of.

The statute declares certain shore and tidelands a "public highway forever."[14] It does not purport to reserve all state-owned tideland in the vicinity as a public highway. We point out that the public highway is not described as abutting upland property; it is defined as "abutting or fronting on said

---

[14]The highway created is not a road intended for automobile traffic. It is a recreational area. As Judge Fullerton explained in Williams Fishing Co. v. Savidge, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

"... Prior to the year 1901, when the legislature declared the tidelands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public. . . . ."

ocean." Its seaward boundary is "extreme low tide"; its inland boundary is the line of "ordinary high tide . . . as such shore and beach now are [1901] or hereafter may be." Assuming that there had been accretion between 1889 and 1901, it does not follow that this statute disclaims state ownership therein. State-owned land may still remain between the inland boundary of the "public highway" (ordinary high tide as such shore and beach now are) and the 1889 line of ordinary high tide. It might, of course, be subject to sale to the abutting upland owner or others as the statutes provide. True, the boundaries of the reserved public highway may shift seaward because of accretion (a question we do not decide), but such move would in nowise affect the inland boundary of state-owned lands. It would simply preserve the prime portion of the beach for the public.

Our interpretation of Laws of 1901 (RCW 79.16.170 quoted supra) is fortified by Laws of 1929, chapter 78, which provides:

> The commissioner of public lands is hereby authorized to offer for sale and sell in the manner hereinafter provided, all, or any portion of, the following described lands:
>
> [described]
>
> lying above and on the land side of the inner boundary of the highway reservations made by chapter CV [105] and chapter CX [110], Laws

of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist.

Thus, the legislature recognized an "inner boundary of the highway reservation" and authorized the sale of lands lying inland of this inner boundary of the highway reservation.[15]

A fundamental error of the trial court in the instant case is the application of the 1901 and 1929 statutory language to "a line of ordinary high tide as the same now is or as it may hereafter exist" to a factual situation to which it has no application.

The Nature of Tides

Tides are the result of gravitational attraction of the moon and sun upon the waters of the earth. Their heights vary with the changing positions of the moon, sun and earth in relation to each other. Changes in winds, barometric pressures, and the freshets or droughts of rivers, together with the geography of the locale, will cause tides to be higher or

---

[15]Laws of 1963, chapter 212, p. 1058 provides that that portion of the public highway established by Laws of 1901, chapters 105 and 110 "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared a public recreation area and is hereby set aside and forever reserved for the use of the public." We believe this is the first legislative use of the terms "line of vegetation" and "mean high tide" as distinguished from "ordinary high tide."

lower than predicted by the United States Coast and Geodetic Survey. There are usually two high and two low waters or tides a day. They may be designated, lower low water, low water, high water and higher high water. The datum (plane of reference) from which the heights of tides are calculated on the Pacific Coast (with the exception of Balboa, Panama) is the mean or average of the lower of the two low waters of each day.[16]

In Marmer, Tidal Datum Planes, p. 86 (U.S. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. No. 135, rev. ed. 1951), it is stated:

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of the high waters at that place over a period of 19 years.

In its findings of fact, the trial court stated:

> mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

---

[16]Bowditch, American Practical Navigator, p. 252, U.S. Navy Dept. Hydrographic Office, No. 9 (1943); 1965 Tide Tables, p. 7, U.S. Dept. of Commerce, Coast and Geodetic Survey; See United States v. California, 381 U.S. 139, 14 L. ED. 2d 296, 85 Sup. Ct. 1401 (May 17, 1965), in which the court equated the "line of ordinary low water" with "mean lower low water." Shalowitz, 2 Shore and Sea Boundaries 255 (U.S. Dept. of Commerce 1964).

Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at a point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide." The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "ordinary high tide" in 1889, as defined by the state, and "mean high tide," as presently determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet.

The problem presented is pinpointed by one author as follows

> Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired, for example, mean high-water mark. mean low-water mark. . . . The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations), is for all prac-

tical purposes a permanent one. Shalowitz, 1 Shore and Sea Boundaries 89 (United States Department of Commerce 1962).

"Mean high tide" is measurable and determinable.

[3] On the other hand, "the line of ordinary high tide" as used in Article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an over-simplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word "ordinary" to be used in its everyday context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

Administrative and Superior Court Interpretations

The record before us supports the conclusion that the commissioner of public lands has established the common boundary between upland property and state-owned land to be the line of ordinary high tide where it existed November 11, 1889. Over the years, 73 lawsuits affecting 322 private ownerships

have been instituted against the state to establish this boundary. The judgments of the superior court are before us as exhibits in the instant case. None was appealed. The state accurately described these judgments when it said in its opening brief:

> In every one of these cases the court has divided the accreted lands on the same formula: those accreted lands formed prior to statehood are the property of the private upland owner; those accreted lands formed since statehood are public beach and shore.

The language of these judgments varies in minor respects. In some the 1889 line of ordinary high tide is related to a surveyed corner and described by metes and bounds; in others it is described as being a stated number of feet above the "line of mean lower low water," thus a standard set by the United States Coast and Geodetic Survey is recognized; in still others the 1889 line is described with particularity by reference to the Washington Coordinate System, South Zone, as claimed by the state in the instant case. In practically all of the judgments the 1889 line as surveyed and described therein is judicially determined to be the line of "ordinary high tide where it existed on the 11th day of November, 1889, established by the commissioner of public lands." Thus over the years the only state constitutional court of general jurisdiction established a rule of property

which has been relied upon and applied on many occasions when the state has sold tidelands pursuant to statutory authority.

Following the decision of this court in Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957), the superior court judgment entered thereafter further described the 1889 line as the line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established. In Shelton Logging Co. v. Gosser, 26 Wash. 126. 66 Pac. 151 (1901), this court had already considered the line of vegetation and the line of mean high tide to be the same. Further, in Harkins, supra, there was an unchallenged finding of fact equating "the line of ordinary high water" with the "line of mean high tide." No further description was necessary.

Court Decisions

Two years after its adoption, the landmark case of Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891), brought Article 17 of the constitution to the Supreme Court for construction and interpreta-

tion. The five-man court[17] was unusually well qualified to consider it.[18]

Plaintiff, the owner of upland property abutting the high-water mark of Puget Sound, claiming he was entitled to certain littoral rights, sought to enjoin defendants from maintaining and using certain improvements upon tidelands in front of the property. The improvements had been erected prior to March 26, 1890, were in actual use for commerce, trade and business, and subject to purchase by defendants under Laws of 1889-90, § 11, p. 435. (See supra.)

[4] At the outset, we emphasize, as does the Eisenbach opinion, that "riparian rights in the several states are settled by the respective states for themselves." The decision was made when the constitution was adopted in 1889 and confirmed by the admission of the state into the federal union upon an equal basis with other states.

The state of Washington asserts its ownership

---

[17]See Chronological History of the Supreme Court of the State of Washington, 61 Wn.2d 792, (1963).

[18]Judge John P. Hoyt had been president of the constitutional convention; Judge Ralph O. Dunbar had been chairman of the committee to draft the constitutional provisions for state, school, and granted lands, which encompassed tidelands; and Judge T. L. Stiles, who wrote the dissent, actively opposed constitutional regulation of tidelands on the ground the doctrine was against sound public policy.

> to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . . Art. 17, § 1, State Const.

The constitutional assertion of state ownership is clear and unambiguous. As Judge Anders said in his well-considered opinion, "it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion."

In the Eisenbach case, plaintiff contended that whatever may be the title of the state to the soil under tide water, he, by virtue of his contiguity to the water, had certain rights in the shore peculiar to himself. He claimed a vested property right (a) to wharf out opposite his upland and have unobstructed access to the navigable water in front of his property and (b) to acquire by accretion land that might thereafter be formed.

After a meticulous analysis of the authorities, this court said:

> The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in actual propriety, and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of

> the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature.

The court concluded:

> We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the state or its grantees to extend wharves in front of his land below high water mark.

The court did not completely resolve plaintiff's second contention in the Eisenbach case—his claimed vested right to future accretion. The court said:

> we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence.

The court did, however, point out that the authorities to the contrary were, "based either upon statutes or local customs, and are therefore not precedents binding upon us."

[5,6] That which did not exist when Eisenbach was decided — accretions seaward of upland property — now exists. We conclude that its ownership is resolved by the rationale of Eisenbach and that accretion formed since November 11, 1889 is an addition to state-owned property, not to upland property. As the court said:

> The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good.

Our conclusion is not startling. It is simply a reaffirmance of a rule of property established by many prior superior court decisions heretofore discussed, and of the rule relied upon over the years in a myriad of land transactions between individuals and between the state and individuals.

At the next session of the Supreme Court the questions discussed in Eisenbach were again submitted to and re-examined by the court in Harbor Line Commissioners v. State, ex rel. Yesler, 2 Wash. 530, 27 Pac. 550 (1891). The court said:

> The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide.
>
> The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto.

The state's constitutional assertion of ownership

in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature.

This conclusion is fortified by the court's opinion in Washougal & LaCamas Transp. Co. v. Dalles P. & A. Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902), wherein the state's grantee of shorelands sought to claim shorelands created in part by erosion (the opposite of accretion) and by debris caught and held by pilings. The court held:

> It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.

In the instant case plaintiff's (respondent's) argument in support of the judgment of the trial court orbits around three decisions: Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 80 L.Ed. 9, 56 Sup. Ct. 23 (1935), Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946), and U.S. v. State of Washington, 294 F.2d 830 9th Cir. (1961). It was apparently the third decision which triggered this action.

We do not find the three cases apposite. Borax, supra, establishes the rule that mean high tide (the average height of all high waters through a com-

plete tidal cycle) is the criterion for "ordinary high water."[19] The case does not involve the question of accretion.

Some of the language in Ghione, supra, read without reference to the particular facts before the court, seems to lend weight to respondent's argument in support of the judgment. This case, however, involves the ownership of the bed of two rivers, first surveyed in 1865. River courses had changed gradually over the years; one was changed artificially in 1913. Finally one river ceased to flow when the level of the water of Lake Washington was lowered in 1915. The case does not involve tidelands. We have no quarrel with the decision as applied to the facts; we do not, however, deem it controlling of the instant case.

[7] In United States v. State of Washington, 294 F.2d 830 (1961), certain lots in Grays Harbor abutting on the Pacific Ocean belonged to the federal government subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian. The lots were at all times part of the public domain until patented. The court applied federal law and determined that ac-

[19]We are aware of the footnote reference in Narrows Realty Co. v. State, 52 Wn.2d 843, 329 P.2d 836 (1958), equating "the line of ordinary high tide" with "neap tides," but the reference is not necessary to the decision and is, therefore, dictum.

cretion belonged to the uplands owned by it subject to the trust patent. We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens.

In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The property line is the line of ordinary high tide, which we equate to mean high tide on that date. Littoral rights of upland owners were terminated. Upland owners have only those rights subsequently recognized by legislative enactment. All accretion subsequent to November 11, 1889 is owned by the state and may be sold or reserved as a public highway or public recreation area as the legislature shall determine.

The judgment is reversed and the cause remanded for entry of judgment not inconsistent with the views herein expressed.

It is so ordered.

ROSELLINI, C. J. FINLEY, J. HAMILTON, J.
DONWORTH, J. OTT, J. HALE, J.

concur.

HILL, J. (dissenting)—I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read and understand point in the opposite direction, so I am compelled to dissent.

We *must decide* whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is really as simple as that.

Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See Washougal and LaCamas Transporation Co. v. Dalles, Portland and Astoria Navigation Co., 27 Wash. 490, 496, 68 Pac. 74 (1902). In Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10. 80 L.Ed. 9, 56 S. Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tideland is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would

have made any difference as to whether federal law should be applied.

Signpost 2: Federal law being applicable, the "shifting boundary theory" applies.

If federal law is applicable, then United States v. State of Washington.[20] 294 F.2d 830 (9th Cir. 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States. The western or seaward boundary to the property involved[21] in that case was, as here the line between uplands and tidelands. The present line of "mean high tide," which was defined as the average elevation of all high tides at a given location through a complete tidal cycle of 18.6 years,

---

[20]It is interesting to note that in the cited case the state of Washington made all of the arguments it makes here for its fixed boundary of November 11, 1889, but found the Circuit Court of Appeals a forum less friendly to its idea of rewriting the law relative to accretions.

[21]The property involved: "Lots 3 and 4 of section 15 in township 18 north of range 12 west of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington," belonged to the United States, subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian who died in 1930. In 1858, these lands were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. The accretions which pushed the high-water mark seaward were held to belong to the United States subject to the heirs of Samson Johns, and not to the state of Washington.

was held to be that boundary. This definition was formulated by the United States Coast and Geodetic Survey and is part of what has been called the "shifting boundary theory." 2 Shalowitz, Shore and Sea Boundaries, 503 note 34.

This is the western or seaward line fixed by the trial court in this case, and it should be affirmed.

If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law,[22] and (as we have seen) by the federal law. It is a plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed. This is conceded in the state's brief when it says:

> It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands[23] that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. . . .

---

[22]" . . . At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion." United States v. Washington, supra (p. 834); Shively v. Bowlby, 152 U.S. 1, at page 35, 38 L.Ed. 331, 14 Sup. Ct. 548 (1894).

[23]I would interpolate "former" before "tidelands."

I would extend my discussion to point out four interesting circumstances that have been lost sight of, or at least have been obscured, to date:

1. We have not previously defined the exact meaning of the phrase "line of ordinary high tide," as used in Art. 17, § 1 of our state constitution.

The case of Harkins v. Del Pozzi, 50 Wn.2nd 237, 240, 310 P.2d 532 (1957) states:

> The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes.

However, the authority cited for this proposition is an Idaho case which was actually concerned with the ordinary high water mark on Lake Pend Oreille. The Circuit Court of Appeals rejected such a definition in United States v. State of Washington, supra, saying:

> In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other non-tidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes. (p. 834)

There is also dictum in Narrows Realty Co. Inc. v. State of Washington, 52 Wn.2d 843, 844, n3 329 P.2d 836 (1958), which defines the phrase as:

> ". . . . line of 'ordinary high tide,' that is, the usual or ordinary high-water mark, the limit reached by the 'neap tides,' those tides which happen between the full and change of the moon twice in every 24 hours . . ." 30 Words & Phrases 253. (Perm. ed.)

Neither of these cases involved imperceptible accretions or were concerned with the problem of possible shifting boundaries.

The question of whether the "line of ordinary high tide" is a shifting line is squarely presented here, and I believe the definition of this constitutional phrase should (and perhaps must) be identical with the definition of "mean high tide" heretofore quoted and adopted by the federal courts.

2. The state's ownership of

> the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . [Const. art. 17, § 1]

is not questioned. Any rights of riparian or littoral owners in such "beds and shores" have properly been held to present a question of local law. Such a case was Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891), on which the state and the majority

place great reliance. The case dealt solely with the relative rights of the state and the upland owner in the tidelands, the court holding that the upland owner had no right to extend a wharf beyond the high-water mark. The court specifically declined to decide whether plaintiff would be entitled to future accretions to his land.

No question, as to the complete control of the state over "beds and shores" of all navigable waters is raised. Hence, the Eisenbach case has, it seems to me, no application.

The state had, on November 11, 1889, and the state has today and has had at all intervening times, title to the beds and shores of all navigable waters of the state lying seaward of the line of ordinary high tide (properly equated to mean "the line of mean high tide," as defined herein). The state loses no tidelands by the shifting boundary, because the accreted land has become "fast land" and it always has had title to the shore and beach between ordinary high tide (mean high tide) and extreme low tide. But, by the fixed-boundary rule, which Washington and "at least two other states" have invented, the upland owner loses the "fast land," which has been added to his upland by slow and imperceptible accretion, and his contact with the line of mean high tide

which, in many instances, may have been the reason for the acquisition of the property.

It is apparent also that the purpose of the state is not primarily to make a greater area available for public use, but to dispose of such accreted lands to private individuals and put a new upland owner between the grantees of the original upland owner and the line of mean high tide. That the state does not consider accretion as shore or beach, is evidenced by its sale thereof, for the state certainly would not disregard the statutory declaration that

> [S]hore and beach of the Pacific Ocean, . . . between ordinary high tide [mean high tide] and extreme low tide . . . shall remain forever open to the use of the public, [RCW 79.16.170]

and that no part thereof "shall ever be sold, conveyed, leased or otherwise disposed of." (RCW 79.16.171)

3. The really pertinent decision in Washington is not the Eisenbach case, which has nothing to do with imperceptible accretions, but the case of Ghione v. State, 26, Wn.2d 635, 175 P.2d 955 (1946). The state asserted there, as it does here, that it was entitled to all lands covered by navigable waters in 1889. The state also contended that it was entitled to all lands submerged by navigable waters subsequent to 1889.

The court discussed a number of cases—including Eisenbach and an 1899 statute on accretions (cited here by the majority—before adopting a shifting boundary theory which vested title to imperceptible accretions in the upland owner. The majority seeks to distinguish the Ghione case because it involved a river, but the court there believed that the shifting boundary theory applied "to both tidewaters and fresh waters," and there is no apparent reason for distinguishing between them.

4. No consideration has been given to the effect of the fixed boundary theory where there has been an erosion instead of an accretion. We can only speculate as to how the majority opinion would read if this were an erosion case. At certain places, the 1889 line of ordinary high tide or mean high tide is now a long way out in the Pacific Ocean, in consequence of erosion, and the upland owner has seen his upland become tideland to which he has heretofore thought he had no title. Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public, seemingly, would have to swim to enjoy its "highway" and beach rights. Only under the shifting boundary rule will the rights of the public always be preserved in the property in the beds and shores of all navigable waters in the

state, up to and including the line of ordinary high tide—"in waters where the tide ebbs and flows."

I would follow the federal cases, adhere to the shifting boundary rule, and affirm the trial court.

HUNTER, J. concurs with HILL, J.

APPENDIX "K"

ORDER DENYING PETITION FOR REHEARING

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent. vs. THE STATE OF WASHINGTON, Appellant.	No. 37583 ORDER DENYING PETITION for REHEARING

The Court having considered the respondent's petition for a rehearing herein together with the appellant's answer thereto, and a majority of the Judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 14th day of April, 1966.

By the Court:

/s/ HUGH J. ROSSELLINI
Chief Justice

67 W.D.2d 787

APPENDIX "L"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent, v. THE STATE OF WASHINGTON, Appellant.	**REMITTITUR** No. 37583 Pacific County No. 14546

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 20, 1966, became the final judgment of this court in the above entitled case on April 14, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, cost are taxed as follows:

Three Hundred Eighteen and 61/100 ($318.61) Dollars in favor of appellant and against respondent.

The Petition for Rehearing was Denied by an Order filed April 14, 1966.

cc: Court Reporter

Hon. John J. O'Connell
Mr. Harold T. Hartinger
Mr. Laurel L. Tiller
Mr. Charles B. Welsh

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of April, A.D. 1966.

WILLIAM M. LOWRY